Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	DA 05-1348
_____	)	

SPRINT OPPOSITION

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Summary

1. States have no authority to regulate interstate calls, including interstate telemarketing calls, under the Communications Act of 1934. The Telephone Consumer Protection Act ("TCPA") did not expand State authority in this area, and State reliance on various savings clauses is misplaced. In this regard, the former Common Carrier Bureau has already held that the Act precludes a state from regulating or restricting interstate commercial telemarketing calls.

2. The California telemarketing law at issue is invalid even if States possess authority to apply their laws to interstate telemarketing, because the California law conflicts with federal law. Congress enacted the TCPA to "promote a uniform regulatory scheme" governing interstate telemarketing "under which telemarketers would not be subject to multiple, conflicting regulation." It is axiomatic that the Supremacy Clause of the U.S. Constitution nullifies state law that frustrates or stands as an obstacle to federal law and federal objectives. Here, the California telemarketing law, if extended to interstate telemarketing, would make unlawful the conduct that federal law expressly permits. Thus, the California law must be preempted under the conflicts doctrine, at least insofar as it applies to interstate telemarketing.

3. States still have full authority to protect consumers. Preemption of state telemarketing laws as applied to interstate telemarketing will not leave States powerless to protect their citizens or leave consumers without a remedy. To the contrary, Congress has given States and consumers the right to enforce federal law. In addition, States can file suit against interstate telemarketers in state court on the basis of an alleged violation of any general civil or criminal statute of the State.

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Sprint Corporation submits this opposition to a declaratory ruling petition filed by Mark Boling, an attorney who has filed "numerous California lawsuits" against interstate telemarketers ("Boling Petition").[1] Mr. Boling asks the Commission to declare that Section 1770(a)(22) of the California Civil Code is lawful when applied to interstate telemarketing calls – even though this state statute prohibits activity that is expressly permitted under federal law.[2] Sprint demonstrates below that this state statute is void as a matter of law, because Congress has determined that regulation of *interstate* telemarketing should be governed exclusively by federal law.[3]

Because States are beginning to adopt and enforce a wide variety of telemarketing laws that are being extended to interstate telemarketing, Sprint urges the Commission to declare that

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1 *See* Boling Petition for Declaratory Ruling, CG Docket No. 02-278, at 2 (Aug. 11, 2003)("Boling Petition"). *See also* Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling on Preemption of California Telemarketing Rules*, CC Docket No. 02-278, DA 05-1348 (May 13, 2005), *published in* 70 Fed. Reg. 34725 (June 15, 2005).

2 There is also a second, very similar California statute that regulates use of automatic dialing-announcing devices, although Mr. Boling does not mention this statute in his petition: Section 2874 of the California Public Utilities Code. To the extent California intends to apply this statute to interstate telemarketing, it would be subject to the same legal analysis as the statute referenced in Mr. Boling's petition.

3 Sprint does not address through these comments the FCC's exclusive jurisdictional authority over certain types of traffic such as voice over internet protocol (VoIP).

States lack the authority to apply their state laws to interstate telemarketing, because interstate telemarketing is subject exclusively to federal jurisdiction.

I. THE TELEPHONE CONSUMER PROTECTION ACT IN GENERAL

Congress enacted the Telecommunications Consumer Protection Act of 1991 ("TCPA"), codified in Section 227 of the Communications Act,[4] in order to "address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy."[5] Congress determined that "Federal law is needed" because "telemarketers can evade [state telemarketing] prohibitions through interstate operations."[6]

Congress recognized that telemarketing constitutes a legitimate form of commerce, and it declared it necessary to balance individuals' privacy rights with commercial freedoms of speech and trade.[7] Congress therefore adopted a set of baseline restrictions in the TCPA,[8] but it instructed the FCC to adjust these requirements as the public interest warranted.[9] As Congress explained, it is important for the FCC to have "flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy,

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4 *See* PUB. L. NO. 102-243, 105 Stat. 2395 (1991), *codified at* 47 U.S.C. § 227.

5 *Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Declaratory Ruling*, DA 05-1667, at ¶ 2 (June 15, 2005). *See also TCPA NPRM*, 7 FCC Rcd 2736, 2737 ¶ 9 (1992)("The overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy.").

6 Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(7)("Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.").

7 *See id.* at § 2(9)("Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.").

8 *See* 47 U.S.C. § 227(b)(1).

9 *See id.* at § 227(b)(2).

or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution."[10]

Congress also recognized that it was important to have a national set of rules governing telemarketing. As the Commission has observed:

> [I]t was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.[11]

Congress therefore expanded FCC authority to adopt rules that would apply to all telemarketing calls, including intrastate calls.[12] As discussed in more detail in Part II.B below, Congress also permitted States to adopt "more restrictive *intrastate* requirements or regulations."[13]

While Congress determined that States should have no role in regulating interstate telemarketing, it did permit States to enforce the federal rules (so long as the complaint is filed in federal court).[14] In addition, Congress empowered consumers with a private right of action to enforce violations of federal law in state court "if otherwise permitted by the laws or rules of

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10 Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(13). The FCC has issued several orders implementing TCPA, including *1992 TCPA Order*, 7 FCC Rcd 8752 (1992); *1995 TCPA Reconsideration Order*, 10 FCC Rcd 12391 (1995); *2003 TCPA Order*, 18 FCC Rcd 14014 (2003); *2004 TCPA Reconsideration Order*, 19 FCC Rcd 19215 (2004); *2005 TCPA Reconsideration Order*, 20 FCC Rcd 3788 (2005).

11 *2003 TCPA Order*, 18 FCC Rcd at 14064 ¶ 83.

12 *See 2003 TCPA Order*, 17 FCC Rcd 14014, 14064 ¶ 83 (2003)("Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls.").

13 *See* 47 U.S.C. § 227(e)(1)(emphasis added). However, with regard to state laws regulating intrastate telemarketing, States are precluded from adopting technical and procedural standards different from those that the FCC promulgates. *See id.* at §§ 227(d) and (e)(1).

14 *See id.* at § 227(f). States may also proceed in "State court on the basis of an alleged violation of any *general* civil or criminal statute of such State." *Id.* at § 226(f)(6)(emphasis added).

court of a State," and it authorized consumers to recover treble damages for violations of federal law.[15] The Commission also enforces the TCPA and its implementing regulations.[16]

II. STATE LAWS REGULATING INTERSTATE TELEMARKETING ARE VOID AS A MATTER OF LAW

Mr. Boling contends that Section 1770(a)(22) of the California Civil Code does not conflict with federal law even though he claims this state statute applies to interstate telemarketing calls and is more restrictive than the federal rules.[17] This contention lacks merit, as Sprint demonstrates below. However, Mr. Boling's argument suffers from a more fundamental flaw – because his Petition assumes without explanation that California has the legal authority to regulate interstate telemarketing. Sprint demonstrates below that, as a matter of law, States do not have authority to regulate interstate telemarketing. Thus, there is no need for the Commission to address Mr. Boling's conflict preemption argument.

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15 *See id.* at § 227(b)(3).

16 *See, e.g.*, *Dynasty Mortgage Notice of Apparent Liability for Forfeiture*, 20 FCC Rcd 4921 (2005); *Septic Safety Notice of Apparent Liability for Forfeiture*, 20 FCC Rcd 2179 (2005); *Warrior Custom Golf Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 23648 (2004); *Primus Telecommunications Consent Decree Order*, 19 FCC Rcd 17680 (2004).

17 See Boling Petition at 1, 5 and 7. However, Mr. Boling neglects to advise the FCC that California courts have declared that "states are powerless to regulate interstate telephone calls and faxes." *Bonime* v. *DirecTV*, 2003 Cal. App. Unpub. LEXIS 11612 *9 (Second District 2003), *citing Kaufman* v. *ACS Systems*, 110 Cal. App. 4th 886, 896 (Second District 2003). Similarly, the California Public Utilities Commission ("CPUC") has stated that its predictive dialer rules apply to "intrastate predictive dialer calls" only. *See Establishing an Appropriate Error Rate for Connections Made by an Automatic Dialing Device*, Rulemaking 02,02-020, Decision 03-03-038, 2003 Cal. PUC LEXIS 160, at *12 (March 13, 2003).

A. STATES HAVE NO AUTHORITY TO REGULATE INTERSTATE CALLS, INCLUDING INTERSTATE TELEMARKETING CALLS, UNDER THE COMMUNICATIONS ACT OF 1934

Congress in the Communications Act of 1934 established a system of "dual state and federal regulation" over telecommunications – "one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction."[18] Specifically, in Section 2(a) of the Act, Congress charged the FCC with regulating "*all* interstate and foreign communication by wire or radio," while Section 2(b) specifies that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communications service."[19] Federal courts have uniformly held that the FCC has "exclusive jurisdiction" over interstate communications and that as a result, "states are precluded from acting in this area."[20] Similarly, as the Commission recognized in its *2003 TCPA Order*, "states traditionally have had jurisdiction over only intrastate calls."[21]

For example, at issue in *Operator Services Providers of America*, 6 FCC Rcd 4476 (1991) was whether a State possessed the authority to regulate the provision of interstate operator

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18 *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986).

19 47 U.S.C. §§ 152(a) and (b)(emphasis added). *See also* § 151 (FCC was formed for "the purpose of regulating interstate and foreign commerce in communication by wire and radio.").

20 *Ivy Broadcasting* v. *AT&T*, 391 F.2d 486, 491 (2d Cir. 1968). *See also Crockett Telephone* v. *FCC*, 963 F.2d 1564, 1565 (D.C. Cir. 1992); *New York Telephone* v. *FCC*, 831 F.2d 1059, 1064-66 (2d Cir. 1980); *North Carolina Utilities Comm'n* v. *FCC*, 552 F.3d 1036, 1050 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Vaigneur* v. *Western Union*, 34 F. Supp. 92, 93 (E.D. Tenn. 1940)("The effect of the [Communications Act] is to bring all interstate communications under [its] coverage to the exclusion of local statutes or decisions.").

21 *2003 TCPA Order*, 18 FCC Rcd at 14064 ¶ 83. *See also AT&T*, 56 F.C.C.2d 14, 20 (1975)("The States do not have jurisdiction over interstate communications."), *aff'd California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

services. The FCC held that States lacked such authority, concluding that "the Communications Act precludes application of the Tennessee statue to interstate operator services":

> Under the Supremacy Clause, state action may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation. State requirements in such cases are invalid even if the state laws are not inconsistent with federal law. . . . The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state.[22]

States have argued that they possess authority to regulate interstate telecommunications under Section 414 of the Communications Act, a general savings clause.[23] However, the Commission has already considered – and rejected – this very argument in response to a State assertion that they possess authority to regulate interstate communications to "protect consumers against unfair, deceptive and fraudulent practices of interstate carriers":

> Section 414 of the Act does not alter the grant of plenary authority to the Commission over interstate communications. Section 414 of the Act preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation – remedies generally applicable to all corporations operating in the state, not just telecommunications carriers. Only Section 2(b)(1) of the Act limits the authority of the Commission, and that section reserves to the state authority over intrastate communications, not interstate communications.[24]

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22 *Operator Services Providers of America,* 6 FCC Rcd at 4476-77 ¶¶ 9-10 and 12.

23 *See* 47 U.S.C. § 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this chapter are in addition to such remedies.").

24 *Operator Services Providers of America*, 6 FCC Rcd at 4476-77 ¶¶ 8 and 11. *See also AT&T* v. *Central Office Telephone,* 524 U.S. 214, 227-28 (1998)(Section 414 "preserves only those rights that are not inconsistent with [federal law]. . . . In other words, the [Communications] act cannot be held to destroy itself."); *Bastien* v. *AT&T Wireless,* 205 F.3d 983, 987 (7th Cir. 2000)("To read [Section 414] expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create."); *Wireless Consumers Alliance,* 15 FCC Rcd 17021, 17040 ¶ 37 (2000)("Section 414 . . . cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."); *Midwestern Rely*, 69 F.C.C.2d 409, 4127 n.25 (1978)(Section 414 "preserve[s] actions based on breach of

In summary, prior to the adoption of the TCPA in 1991, States lacked all authority to regulate interstate communications, including interstate telemarketing – except to the extent they apply laws "generally applicable to all corporations operating in the state, not just telecommunications carriers."[25]

B. THERE IS NOTHING IN THE TCPA THAT EMPOWERS STATES TO REGULATE INTERSTATE TELEMARKETING

States, unable to demonstrate regulatory authority over interstate telemarketing under the 1934 Act, necessarily must contend that such authority is provided in the TCPA. However, the former Common Carrier Bureau has already rejected this argument:

> The Communications Act, specifically section 227 of the Act, establishes Congress' intent to provide for regulation *exclusively* by the Commission on the use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or prerecorded messages. . . . Maryland can regulate and restrict intrastate commercial telemarketing calls. *The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statues to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state*.[26]

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contract for matters *not* modified by the Act, . . . Section 414 does *not* give rise to [state] actions based on pre-existing duties *which have been modified by the Act.*")(emphasis added); *Richmond Brothers Records* v. *Sprint*, 10 FCC Rcd 13639, 13642 ¶ 15 (1995)(Section 414 does "not, however, permit all possible state causes of action to proceed as if federal regulation of communications did not exist."); *Lowest Unit Charge Requirements*, 6 FCC Rd 7511, 7513 ¶ 20 (1991) (Section 414 does "not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.").

[25] *Operator Services Providers of America*, 6 FCC Rcd at 4477 ¶ 11.

[26] Letter from Geraldine A. Matise, Chief Network Services Division, Common Carrier Bureau, to Delegate Ronald A. Guns, Maryland House of Delegates, at 2-3 (Jan. 26, 1998)(emphasis added).

State appellate courts have agreed with the Commission: "states are powerless to regulate interstate telephone calls and faxes."[27]

As discussed above, Congress in the TCPA did expand State authority over interstate telemarketing, but only in connection with ***enforcing*** the TCPA and federal implementing rules that the FCC adopts. In contrast, as demonstrated below, Congress did ***not*** in the TCPA empower States to ***regulate*** interstate telemarketing through application of their own state telemarketing laws.

1. The TCPA's Section 227(e)(1) Savings Clause Does Not Empower States to Regulate Interstate Telemarketing

States rely upon the TCPA's saving clause in support of their contention that States may regulate interstate telemarketing. Section 227(e)(1) provides in pertinent part:

> [N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, *or* which prohibits (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations.[28]

States, reading this savings clause in isolation, contend that by the use of the word "or," Congress intended to create two different categories of permitted State activity and further, that because the term "intrastate" is used only in the first clause but not the second clause, states are free to "prohibit" interstate telemarketing.[29] In considering this argument, it is important to note

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[27] *Bonime* v. *DirecTV*, 2003 Cal. App. Unpub. LEXIS 11612 *9 (Second District 2003), *citing Kaufman* v. *ACS Systems*, 110 Cal. App. 4th 886, 896 (Second District 2003). *See also Omnibus International* v. *AT&T*, 111 S.W.3d 818, 823 (Texas App. 2003)("States have no independent regulatory power of interstate telemarketing activities.").

[28] 47 U.S.C. § 227(3)(1)(emphasis added).

[29] *See* Indiana Attorney General Reply Comments, CG Docket No. 02-278, CC Docket no. 92-90, at 17-19 (May 19, 2003).

that the Supreme Court has "repeatedly 'declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"[30]

One problem with the State argument is that it ignores the opening clause of this savings clause: "nothing in *this section* or in the regulations prescribed under *this section* shall preempt any State law." Thus, this savings clause by its very terms applies only to Section 227, or the TCPA. Congress did *not* modify Section 2 of the Act, which expressly preempts States from regulating in any way "all interstate and foreign communication," including interstate telemarketing. Put another way, a savings clause can "save" only the jurisdiction that States had already possessed, but states have never possessed authority to regulate interstate communications, as demonstrated in Part II.A above.

In addition, the State argument renders superfluous the portion of the savings clause that preserves state law "impos[ing] more restrictive intrastate requirements or regulations on" enumerated types of calls. If as States contend is the case, a State may prohibit telemarketing calls altogether, including interstate telemarketing calls, then there would have been no reason for Congress to have added the "more restrictive intrastate restrictions" clause in the savings clause; under the State argument, this phrase would become superfluous. It is axiomatic that the Commission must give effect to all words in the Communications Act.[31] The only interpretation that makes use of, and gives effect to, every word in the savings clause, is to read the phrase, "or

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[30] *Geier* v. *American Honda Motor*, 529 U.S. 861, 870 (2000), *quoting U.S.* v. *Locke*, 529 U.S. 89 (2000).

[31] It is "a cardinal principle of statutory construction that a state ought, upon the whole, be so construed that . . . no clause, sentence or word shall be superfluous, void, or insignificant." *Alaska* v. *EPA*, 540 U.S. 461, 489 n.13 (2004). *TRW* v. *Andrews*, 534 U.S. 19, 31 (2001). In addition, courts and regulatory agencies are "obligated not only to construe the statue as a whole, but to give meaning to each word of the statute." *AFL-CIO* v. *Chao*, 409 F.3d 377 (2005).

which prohibits," as completing the phrase "imposes more restrict . . . requirements or regulations on" and is also modified by the term "intrastate."

The Commission has stated that this TCPA savings clause "is ambiguous" and "silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted."[32] Sprint respectfully disagrees. As discussed above, the savings clause applies only to Section 227 and Congress did not amend Section 2 of the Act to permit states to begin regulating interstate telecommunications. Thus, the prohibition on State regulation of interstate services that existed prior to the enactment of the TCPA remains in full force following the TCPA.

The result does not change even if resort is made to canons of statutory construction. A statute must be interpreted in the context of the overall regulatory scheme. In enacting the TCPA, Congress intended to impose Federal law on interstate telemarketing, because states have no authority over interstate calls.[33] Congress also directed the FCC to strike the appropriate "balance" among all of the relevant interests in promulgating implementing regulations and exemptions.[34] In light of this explicit legislative goal of federalizing the regulation of interstate telemarketing, it is clear that Congress did not act to completely negate this basic premise of the TCPA by concurrently extending state regulation of telemarketing to interstate telemarketing. If

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32 *2003 TCPA Order*, 18 FCC Rcd at 14063-64 ¶ 82.

33 *See, e.g.,* S. REP. NO. 102-178, at 5 (1991)("Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.").

34 *See, e.g.,* Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(7)("[T]elemarketers can evade [state law] prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."); *id.* at 2(13)(It is important for the FCC to have "flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls.").

this was Congress' intent, it could have much more efficiently turned jurisdiction of this matter over to the states.

The TCPA's legislative history further confirms that this statute did not enlarge State authority to regulate interstate telemarketing with their state laws:

- Congress, in enacting the TCPA, expressly found that "Federal law is needed" because "telemarketers can evade [state telemarketing] prohibitions through interstate operations."[35]
- The Senate Report accompanying the TCPA stated that "Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls."[36]
- The House Report accompanying the TCPA stated that "federal legislation is needed to relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards."[37]
- One of the co-sponsors of the bill in the Senate and the Chairman of the Senate Commerce Committee stated that "State law does not, and cannot, regulate interstate calls,"[38] and that "[p]ursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted."[39]
- One of the co-sponsors of the bill in the House, and a ranking member of the House Telecommunications Subcommittee, stated that to "ensure a uniform approach to this nationwide problem H.R. 1304 would preempt inconsistent State law. From the industry's perspective, preemption has the important benefit of ensuring that telemarketers are not subject to two layers of regulation."[40]

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35 Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(7)("Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.").

36 S. REP. NO. 102-178, at 5 (1991).

37 H.R. REP. NO. 202-317. at 10 (1991).

38 137 Cong. Rec. S18781, 18784 (daily ed. Nov. 7, 1991).

39 137 Cong. Rec. S16205 (daily ed. Nov. 27, 1991)(remarks of Sen. Hollings).

40 137 Cong. Rec. H10339, 10342 (Nov. 18, 1991)(remarks of Rep. Rinaldo).

- Another co-sponsor of the bill in the House stated that the legislation, which "covers both intrastate and interstate unsolicited calls, will establish Federal guidelines that will fill the regulatory gap due to difference in Federal and State telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes."[41]

The States' response to this legislative history is that these Congressional observations are "wrong."[42]

2. The Second TCPA Savings Clause, Section 227(f)(6), Also Does Not Support the State Position

The TCPA contains a second savings clause, with Section 227(f)(2) providing:

> Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any *general* civil or criminal statute of such State.[43]

As is apparent, this savings clause is very similar to the Communications Act's general savings clause of Section 414 discussed above.[44] The same analysis applies: this savings clause "preserves only those rights that are not inconsistent with" federal law.[45] But as explained above, there is nothing in the Communications Act that empowers States to regulate interstate communications.

In addition, at issue is the application of State "telemarketing" laws to interstate telemarketing – not the application of "general civil statute" to interstate telemarketing. Thus, the State argument that Section 226(f)(6) somehow empowers States to regulate interstate telemarketing is inconsistent with the plain language of this federal statute.

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41 137 Cong. Rec. H793 (daily ed. March 6, 1991)(remarkets of Rep. Markey).

42 Indiana Opposition to the Consumer Bankers Association's Declaratory Ruling Petition, CG Docket No. 02-278, at 13 (Feb. 2, 2005).

43 47 U.S.C. § 227(f)(6)(emphasis added).

44 *See* Part II.A, *supra.*

45 *See AT&T* v. *Central Office Telephone,* 524 U.S. 214, 227-28 (1998).

3. The Cases Relied Upon Do Not Support the State Position

The States have cited several cases for the proposition that they may regulate interstate telemarketing. The holding of these cases is not as clear as the States portray, and these cases indicate considerable confusion over the FCC's position on the subject. In addition, there are other cases that unequivocally hold that States possess no regulatory authority over interstate telemarketing. This divergence simply confirms the need for a Commission declaratory order that clarifies the scope of State authority over interstate telemarketing.

(a) Cases Holding That States Lack Regulatory Authority Over Interstate Telemarketing

Sprint is aware of three court decisions that have squarely held that States do not possess legal authority to regulate interstate telemarketing:

- *Gottlieb* v. *Carnival Corp.*, 367 F. Supp. 2d 301 (E.D.N.Y. 2005). A travel agent filed suit against Carnival for sending him unsolicited fax advertising in violation of both the TCPA and state law. The federal court dismissed the federal claims because, under the TCPA, private rights of action may be brought in state court only. The court also dismissed the state law claim because "the weight of authority hold[s] that state laws such as § 396-aa apply only to intrastate communications" and that the faxes at issue involved interstate communications only. *Id.* at 311.

- *Omnibus International* v. *AT&T*, 111 S.W.3d 818 (Tex. Ct. App. 2003). A firm filed suit in state court alleging that AT&T sent unsolicited fax advertisements in violation of both the TCPA and state law. The Texas appellate court affirmed that under the TCPA's saving clause, the state claim was valid even though it was more restrictive than the TCPA. However, the court further made clear that the state claim applied to intrastate telemarketing only because "States have no independent regulatory power over interstate telemarketing activities." *Id.* at 823.

- *Bonime* v. *DirecTV*, 2003 Cal. App. Unpub. LEXIS 11612 (Cal. App. 2003). In this case. the appellate court recognized that "California's junk fact law regulated only *intrastate* faxes" because "states are powerless to regulate *interstate* telephone calls and faxes." *Id.* at *9 (emphasis in original), *citing Kaufman* v. *ACS Systems*, 110 Cal. App. 4th 886 (2003). *See also id.* at *13-14 ("[P]reemption is irrelevant with regard to interstate faxes, given California's inability to regulate faxes sent to plaintiff in New York.")(supporting citations omitted).

(a) The Cases That States Rely Upon Are At Best Ambiguous

The States have cited four court decisions in support of their position. As demonstrated below, Sprint believes that the cases either do not stand for the proposition for which they are cited or reflect confusion concerning federal law and the Commission's position regarding this law.

- *Van Bergen* v. *Minnesota*, 59 F.3d 1541 (8th Cir. 1995). This case involved a candidate for governor of Minnesota who wanted to use automatic dialing-announcing devices ("ADADs") to reach in-state voters. When Minnesota passed a law banning the use of ADADs for that purpose, Van Bergen argued that the law was preempted by the TCPA because the state law was "less restrictive than the TCPA." *Id.* at 1547. The court disagreed, noting that the TCPA savings clause "expressly does not preempt state regulation of *intrastate* ADA calls that differs from federal regulation." *Id.* at 1548 (emphasis added). This case has nothing to do with the issue here – namely, whether states may regulate *interstate* telemarketing.[46]

[46] This is further apparent from the court's statement that "Congress did not intend . . . to promote national uniformity of ADAD regulation. *Id.* This is certainly accurate as applied to intrastate telemarketing. But as demonstrated in Part II.B.1 *supra*, this statement is not accurate as applied to interstate telemarketing.

- *Florida* v. *Sports Authority Florida*, Case No. 6:04-cv-115-Orl-JGG (M.D. Fla., June 4, 2004). The State filed suit in state court alleging a violation of Florida telemarketing laws. The defendant removed the case to federal court, and the issue was who – a state court or a federal court – should entertain the defendant's federal preemption defense. The federal court was not asked to decide whether the federal preemption defense was valid.

Ordinarily, state law claims cannot be removed to federal court unless Congress "intended . . . to allow removal of such claims to a federal forum." Slip op. at 4. *See also id.* at 7 ("An intent to protect telemarketers against inconsistent state laws, standing alone, does not indicate that Congress intended to allow telemarketers to remove these disputes to district court. State courts are fully capable of adjudicating the merits of a federal defense, including the defense of ordinary preemption."). The federal court here remanded the case to state court because it found no Congressional intent to prohibit state courts from considering federal preemption as a defense.

This federal court had some difficulty in understanding the Commission's TCPA orders. On the one hand, the court stated that if "the FCC is correct, the TCPA could not have preempted state jurisdiction of interstate calls, because states never had such jurisdiction." *Id.* at 8. But in the next sentence, the court stated that "the FCC recognizes that the states implement some 'oversight' of interstate phone activity by law of long-arm statutes." *Id.* What this decision confirms is the need for the Commission to clarify the scope of State authority over interstate telemarketing.

- *North Carolina* v. *Debt Management Foundation Services*, Case No. 5:03-CV-950-FL(3) (E.D.N.C., March 8, 2004). This case also involved a suit by a State in state court alleging a violation of North Carolina telemarketing laws. The defendant removed the case to federal

court, and the issue again was who – a state court or a federal court – should entertain the defendant's federal preemption defense. Like the Florida federal court above, the North Carolina federal court found no "express statement by Congress of [an] intent to make state claims" removable to federal court (Slip op. at 15), and it remanded the case to state court to consider the defendant's federal preemption defense.

Later in its opinion, the court noted the TCPA savings clause and stated with respect to the *2003 TCPA Order*, "the FCC has noted the ambiguity of this non-preemption provision, and recognized that even state law relating to interstate calls *may* remain enforceable by the states." *Id.* at 17 (underscoring in original; italics added). Sprint submits that the court has misread the Commission's *2003 TCPA Order*, and this again confirms the need for the Commission to clarify the scope of state telemarketing law relative to federal telemarketing law.

- *North Dakota* v. *FreeEats.com*, Case No. 04-C-1694 (Burleigh County, N.D., Feb. 2, 2005). The State filed a suit in state court alleging that FreeEats.com violated North Dakota law by using ADAD devices. The State moved for summary judgment, and FreeEats.com argued in response that the calls in question were interstate calls and that the State therefore lacked jurisdiction to apply its laws to this traffic. The Burleigh County trial judge granted summary judgment in favor of the State, relying exclusively on the Eighth Circuit's *Van Bergen* decision, which as discussed above involved intrastate telemarketing only, not interstate telemarketing.

4. The Commission Should Clarify That State Long-Arm Statutes Do Not Empower States to Exercise Regulatory Authority Over Interstate Telemarketing

The Commission in its *2003 TCPA Order* stated that "long-arm" statutes "*may* be protected under section 227(f)(6) which provides that 'nothing contained in this subjection shall be construed to prohibit an authorized State official from proceeding in a State court on the basis of

an alleged violation of any general civil or criminal statute of such State.'"[47] A recent federal district court decision quoted this sentence for the proposition that "the FCC recognizes that the states [may] implement some 'oversight' of interstate phone activity by way of long-arm statutes."[48] In fact, state long-arm statutes are not relevant to the narrow legal issue raised by the Boling Petition – namely, whether States possess the legal authority to regulate interstate telemarketing.

The Supreme Court has observed that "[j]urisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction) so that the court's decision will bind them," and that the character of these two jurisdictional requirements "unquestionably differs."[49] Subject-matter jurisdiction "defines the court's authority to hear a given type of case."[50] Personal jurisdiction, in contrast, is concerned with "the relationship of a given defendant to a particular geographic area in which the case is brought."[51]

Importantly, "long-arm statutes govern personal jurisdiction, not subject matter jurisdiction."[52]

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47 *2003 TCPA Order*, 18 FCC Rcd at 14065 ¶ 85 (emphasis added).

48 *Florida* v. *Sports Authority Florida*, Case No. 6:04-cv-115-Orl-JGG, Slip. op. at 8 (M.D. Fla., June 4, 2004). *See also North Carolina* v. *Debt Management Foundation Services*, Case No. 5:03-CV-950-FL(3), Slip op. at 17 (E.D.N.C., March 8, 2004).

49 *Ruhrgas* v. *Marathon Oil*, 526 U.S. 574, 577, 583 (1999).

50 *U.S.* v. *Morton*, 467 U.S. 822, 828 (1984).

51 *U.S.* v. *Thistlethwaite*, 110 F.3d 861, 864 (2d Cir. 1997).

52 *Id.* at 868.

> [P]ersonal jurisdiction gained by way of Florida's long-arm statute does not confer subject matter jurisdiction. . . .[53]

Courts have consistently dismissed lawsuits when they lack subject matter jurisdiction even when they possess personal jurisdiction over the defendant *via* a long-arm statute.[54] Thus, the fact that a State may have personal jurisdiction over an out-of-state telemarketer (*via* its long arm statute) does not mean that the court additionally has subject matter jurisdiction to entertain the lawsuit.

There is a second reason why long-arm statutes are irrelevant to the matter before the Commission. Section 227(f)(6) permits state claims on the basis of an "alleged *violation* of any general civil or criminal statute of such state."[55] However, long-arm statutes do not proscribe any particular conduct, and a person cannot be said to "violate" a long-arm statute. Accordingly, long-arm statutes are not encompassed within the scope of the TCPA savings clause contained in Section 227(f)(6).

In summary, to eliminate the confusion that has resulted from the Commission's past reference to long-arm statutes, Sprint urges the Commission to clarify that long-arm statutes do not empower States to regulate interstate telemarketing.

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53 *Jesse* v. *Florida,* 771 So. 2d 1179, 1181 (Fla. App. 1998). *See also Hogrobrooks* v. *Progressive District,* 858 So. 2d 913, 918 (Miss. App. 2003)("[T]he 'long-arm statute' relat[es] to personal, not subject matter jurisdiction.").

54 *Moore* v. *Lindsey*, 662 F.2d 354, 357 (5th Cir. 1981)("We hold that the Georgia long arm statute confers personal jurisdiction over Lindsey and that, because it had no subject matter jurisdiction, the district court properly refrained from issuing an injunction."); *Hawley* v. *Murphy*, 736 A.2d 268, 271 (Maine Sup. Ct. 1999)("A judgment that is issued by a court that does not have subject matter jurisdiction to issue it is void."); *South Dakota* v. *Sadlier,* 586 N.W.2d 171, 173-74(S.D. Sup. Ct 1998)("Personal jurisdiction over Sadlier is established through application of our long-arm statute . . . . Because the circuit court . . . lacked subject matter jurisdiction, that judgment is void."); *Jesse* v. *Florida,* 771 So. 2d 1179 (Fla. App. 1998).

55 47 U.S.C. § 226(f)(6)(emphasis added).

III. IN ANY EVENT, THE CALIFORNIA STATUTE CONFLICTS WITH FEDERAL LAW AND MUST BE PREEMPTED

The California statute at issue in the Boling petition is invalid even if States possess the authority to adopt state telemarketing laws that apply to interstate telemarketing calls. The California statute prohibits certain activity that federal law permits relative to interstate telemarketing. The California statute thus conflicts with federal law and must be preempted under the conflicts preemption doctrine.

The California statue at issue, California Civil Code § 1770(a)(22), prohibits any use of prerecorded messages except in three situations not relevant here.[56] This statute thus makes unlawful several types of activities that are lawful under federal law, including use of prerecorded messages to businesses, in an emergency, and in connection with non-commercial calls.[57]

A fundamental purpose of the TCPA was to create a consistent and uniform national system for placing calls to consumers and businesses. Specifically, Congress passed the TCPA in order "to promote a uniform regulatory scheme" governing interstate telemarketing "under

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56 The general prohibition is contained in Section 1770(a)(22)(A), which provides:

> The following unfair methods of competition . . . are unlawful: . . . (22)(A) Disseminating an unsolicited prerecorded message by telephone without an recorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

The three exceptions to this general prohibition are contained in Section 1770(a)(22)(B), which provides:

> This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

57 *See* 47 C.R.R. § 64.1200.

which telemarketers would not be subject to multiple, conflicting regulations."[58] In this regard, Congress determined that the FCC, not each State, that should possess the "flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution."[59]

It is axiomatic that state law is "nullified" by the Supremacy Clause when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Geier* v. *American Honda Motor Co*., 529 U.S. 861, 873 (2000). In *Geier*, federal agency regulations established performance requirements for passive restraint systems (*e.g.*, airbags, automatic seat belts) and permitted automobile manufacturers to choose the particular technology to satisfy that requirement. The state tort action at issue would have effectively required manufacturers "to install airbags rather than other passive restraint systems." *Id.* at 881. The Court determined that this tort action "would have presented an obstacle to the variety and mix of [safety] devices that federal regulation sought" and the "gradual passive restraint phase-in that federal regulation deliberately imposed." *Id*. Accordingly, the Court held that "[b]ecause the [state] rule of law . . . would have stood 'as an obstacle to the accomplishment and execution of' . . . important . . . federal objectives . . . it is pre-empted." *Id*.

Similarly, the California statute at issue in the Boling Petition stands an "obstacle to the accomplishment" of the uniform balancing of interests that the TCPA entrusted to the FCC.

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58 *See 2003 TCPA Order*, 18 FCC Rcd at 14064 ¶ 83. *See also* H.R. Rep. No. 101-633, at 3 (July 27, 1990)(TCPA is "an attempt to resolve the patchwork of intrastate and interstate regulation . . . by establishing a single set of rules to guide telemarketers."); 137 Cong. Rec. S18785 (daily ed. Nov. 27, 1991)(statement of Sen. Pressler)("The Federal Government needs to act now on uniform legislation to protect consumers.").

59 Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(13).

Specifically, the California statute, if applied to interstate telemarketing, would make unlawful the very conduct the federal law permits. And, this statute would make this conduct unlawful when Congress was very clear that it should be the FCC – and not each State – that should possess the "flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy."[60] As the Supreme Court in *Geier* noted, to permit the California restrictions on interstate telemarketing to stand would take from federal agencies the "very ability to achieve the [federal] law's congressionally mandated objectives that the Constitution . . . seeks to protect."[61]

IV. STATES STILL HAVE FULL AUTHORITY TO PROTECT CONSUMERS

Federal preemption of state telemarketing laws as applied to interstate telemarketing will not leave States powerless to protect their citizens or leave consumers without a remedy.[62] To the contrary, Congress created a variety of remedies and forums for consumers and States, including:

- States *via* their attorney general can enforce consistent national standards by filing suit against interstate telemarketers, and they are expressly given investigatory powers to prosecute those who violate federal law;[63]
- Consumers can file in state court complaints based on a violation of federal law, with a federal treble damages remedy;[64]
- Consumers can file complaints with the FCC;[65]

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60 Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(13).

61 *Geier*, 529 U.S. at 862.

62 As the Supreme Court made clear in *Geier*, even laws of general applicability (*e.g.*, state tort actions), must be preempted if they impose an obstacle to the federal objectives. However, the consistency of general state laws as applied to federal activity ordinarily cannot be determined without a case-by-case analysis.

63 *See* 47 U.S.C. §§ 227(f)(1) and (f)(5).

64 *See id.* at § 227(b)(3).

65 *See id.* at § 208.

- Consumers can file their complaints with their state commission, which can then forward them to the FCC;
- The Commission can exercise its forfeiture authority against interstate telemarketers who violated federal law,[66] or file civil actions against the offender;[67]
- States can file suit against interstate telemarketers in state court "on the basis of an alleged violation of any *general* civil or criminal statute of such State;"[68] and
- States can recommend that the FCC modify its TCPA rules, which uniformly apply to both interstate and intrastate telemarketing.[69]

In short, States have authority to protect their citizens from interstate wrongdoers even if the TCPA is read as Congress intended.

V. CONCLUSION

Congress in enacting the TCPA provided for dual state/federal ***enforcement*** of rules governing interstate telemarketing, but it made clear that the rules to be used in enforcement are to be federal rules only. For the foregoing reasons, Sprint Corporation respectfully requests that the Commission declare that state telemarketing laws, to the extent they purport to apply to interstate telemarketing, are void.

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66 *See, e.g., Dynasty Mortgage Notice of Apparent Liability for Forfeiture*, 20 FCC Rcd 4921 (2005); *Septic Safety Notice of Apparent Liability for Forfeiture*, 20 FCC Rcd 2179 (2005); *Warrior Custom Golf Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 23648 (2004); *Primus Telecommunications Consent Decree Order*, 19 FCC Rcd 17680 (2004).

67 *See* 47 U.S.C. § 227(f)(7).

68 *Id.* at § 227(f)(6)(emphasis added).

69 *See* 47 C.F.R. § 1.401.

Respectfully submitted,

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